84-886 No.

Office Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN,
Petitioners,

-vs-

THE FIRST PEOPLES BANK OF NEW JERSEY, THE MARY V. SULLIVAN TRUST FUND, THOMAS E. SUNDSTROM, Trustee, DONALD R. SUNDSTROM, Trustee, HARRY F. SUNDSTROM, Deceased, Trustee, JOHN J. MASTER, JR., ESQ., (A New Jersey Attorney at Law), JOHN J. MARKWARDT, ESQ., (A New Jersey Attorney at law), JANET STUART and SURTEES L. MacKERCHAR, (Trust Officers of the First Peoples Bank of New Jersey),
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Did the actions of the U.S. Magistrate, and District Court Judge, deny Petitioners right of trial by jury as demanded in Original Complaint, by dismissing said complaint under *28 USC 636*?

The text of *28 USC 636* is found in the appendix. The text of *Rule 38 FRCP* is found in the appendix. The text of the *U.S. Constitution, Article VII* is found in the appendix.

Did repeated violations of General and Local Rules of the New Jersey Courts by trial judge deprive Petitioners of fair hearing, and opportunity to be heard, in violation of the due process and equal protection clause of U.S. Constitution?

The text of the General Rules, and Local Rules of the United States District Court for the District of N.J. are found in the appendix.

Did United States Court of Appeals err in limiting the present appeal to confined issue of defective service of final order adjudicating all claims with all parties to toll running of time for appeal from District Court to U.S. Court of Appeals?

The text of *Rule 60* is found in the appendix.

Did District Judge err in dismissing cross claim of Thomas E. Sundstrom, Defendant, without notice of ten days under *Rule 56 FRCP*, and without any notice of motion to Petitioners?

The text of *Rule 56 FRCP* is set forth in the appendix.

Did opposing counsel of Petitioners violate rules of service set forth in Local Rules of the Federal Courts of New Jersey?

The text of *Rules 9, 12, 15, 22, 23, 28, and 30*, are set forth in the appendix.

Did defective service of final order adjudicating all claims as to multiple parties deprive Petitioners of right to appeal, and due process and equal protection of the law?

The text of the *Fifteenth and Fourteenth Amendment of the United States Constitution* is set forth in the appendix.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

NO _____

JAMES SUNDSTROM SULLIVAN and
HELEN DAWSON SULLIVAN,
Petitioners

v.

THE FIRST PEOPLES BANK OF NEW JERSEY, THE MARY V. SULLIVAN TRUST FUND, THOMAS E. SUNDSTROM, Trustee, DONALD R. SUNDSTROM, Trustee, HARRY F. SUNDSTROM, Deceased, Trustee, JOHN J. MASTER, JR., ESQ., (A New Jersey Attorney at Law), JOHN J. MARKWARDT, ESQ., (A New Jersey Attorney at Law) JANET STUART and SURTEES L. MacKERCHAR, (Trust Officers of the First Peoples Bank of New Jersey)
Respondents

(D.C. of N.J. Civil No. 80-1554)

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

James Sundstrom Sullivan, and Helen Dawson Sullivan, husband and wife, the Petitioners above named, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, insofar as it limited the appeal of the Petitioners to the issues presented in the District Court order of November 21, 1983, regarding defective service of the final order of the lower court, and bypassed the merits of the First Appeal to the United States Court

of Appeals, No. 81-1868, and the Second Appeal to the United States Court of Appeals, No. 83-5922. Petitioners petition for a complete review of the procedural defects arising from the actions of the United States Magistrate, the United States District Judge, and the Clerk of the Court, which defects denied the Petitioners of a trial by jury as prayed for in their Original Complaint, and violated their constitutional rights of due process, and equal protection of the law.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Third Circuit is set forth in the Appendix attached to wit:

	Appendix
Judgment Order of June 10, 1982, No. 81-1868 before Gibbons, Maris, and Garth, Circuit Judges.	26a
Interlocutory Order Limiting the Second Appeal to Issues presented to the lower court, and restraining judgment on the merits of the Original Complaint, April 19, 1984, No. 83-5922, before John J. Gibbons, Judge.	35a
Order Dismissing the Appeal of Defendant Thomas E. Sundstrom, C.A. No. 84-5367, dated June 18, 1984, for filing the appeal out of time, before Judges Aldisert, Weis, and Becker.	37a
Order affirming the judgment of the District Court of New Jersey, arising from a Memorandum Opinion, before Gibbons, Sloviter, and Van Dusen, Circuit Judges, on September 4, 1984.	44a
Order of the District Court of N.J. denying motion to correct defective service of final order adjudicating multiple claims with multiple parties. November 21, 1983, before Hon. John F. Gerry, U.S.D.J.	32a
Order Dismissing Counterclaims of the Defendants John J. Master, Jr., Esq., and John J. Markwardt, Esq.; and Cross Claim of Defendant Thomas E. Sundstrom, Trustee, before Honorable John F. Gerry, U.S.D.J., on July 14, 1983.	30a

Order denying motion to reinstate Original Complaint of the Plaintiffs, before Hon. John F. Gerry, U.S.D.J., combined with denial of motion of Petitioners for partial summary judgment against Defendant Thomas E. Sundstrom, dated and entered July 13, 1983. 29a

Order denying motions of Petitioners to set aside default, and leave to file answers to counterclaims of defendants, along with motion to extend discovery time, and Order incorporating report and recommendation of the United States Magistrate of March 5, 1981 for Dismissal of Original Complaint, before Hon. John F. Gerry, U.S.D.J., on March 16, 1981. 25a

Report and Recommendation of Hon. James F. Hammill, United States Magistrate, dated and entered March 5, 1981, with annexed affidavit of Cosmo A. Giovinazzi, Esq., dated February 6, 1984. 5a

Objections to the Report and Recommendation of the United States Magistrate, (excluding exhibits to original filed) timely filed by Petitioners on March 18, 1981. 14a

Order of State Appellate Court of New Jersey staying sale of Trust Premises, January 18, 1980, before Allcorn, Morgan, and Horn, Appellate Judges, Superior Court of N.J. 1a

Order of State Appellate Court of New Jersey denying stay of sale of trust premises, (recalling Order of January 18, 1980) entered February 6, 1980, before Allcorn, Morgan, and Francis (replacing Horn, J., retired February 1, 1980.) 3a

State Court Probate Order of Settlement, directing sale of trust premises to Petitioner James Sullivan, entered August 29, 1978, before Nathan C. Staller, County Judge, State of N.J. 150a

JURISDICTION

Jurisdiction of this Court is invoked under *28 USC 1254* from a judgment of the United States Court of Appeals for the Third Circuit, entered on September 4, 1984, which affirmed a judgment of the United States District Court of New Jersey, which lower court entered such order on November 21, 1983.

STATEMENT OF THE FACTS

This matter was filed as a result of a breached settlement in the Probate Court of the Superior Court of New Jersey, in which the property had been ordered to be sold to the Petitioner Sullivan as part of that settlement (150a). After meeting strict time requirements, the Defendants Donald R. Sundstrom, John J. Markwardt, Esq. refused to go to settlement on December 22, 1978. After setting down another date in January of 1979, the Defendants again refused to attend settlement and pass title, stating that they necessitated more court guidance. Again, in late February of 1979, the Defendants again refused to pass title, and cited the same and identical reason. The Probate Judge had been hospitalized in early February of 1979, and was not due back on the bench until April of 1979. During the interim, the Defendant Thomas E. Sundstrom had been caught in a fire and had leaped three stories with a child on his back to cushion the fall, and suffered multiple breaks in his leg, and othe minor injuries. Being destitute, losing furniture, auto, money, job, and the likes, he was out in the street, and was taken back to Maryland with the Petitioner, until such time, he could apply for trust funds to aid and assist himself. The Defendant 1st Peoples Bank of N.J. refused, through the Defendants MacKerchar and Stuart, and the Defendant Thomas E. Sundstrom was jailed three times during the following months for trespassing and vagrancy. While he had live funds in the 1st Peoples Bank of N.J., the funds were refused to him. After treatment by the corporate trustees, he refused to sign the deed, and as a consequence, the fourth settlement cancelled, and the corporate trustees proceeded to sell the premises. To this effort, the Petitioner appealed the First Intermediate Accounting which had been settled, and upon application, was granted a stay for the sale of the home, pending the full appeal before the Appellate Court. Of the three judge panel, one of the judges retired from the bench, and after the time for ap-

pealing the stay had lapsed, the Defendant Master visited the chambers, ex parte, of the newly installed judge, who operated a recall of the stay, and the premises were ordered sold under the lower court order.

It was then that Petitioners filed suit in the United States District Court, citing a breach of contract in settlement conditions, and with intentional interference with his mortgage application, and subsequent purchase of the premises.

While service of the Original Complaint was perfected, the Defendants filed answers, and a counterclaim for malicious prosecution, and mailed the answer back to Maryland to a Post Office Box which had been closed for some time, and which was not set forth on the complaint and the answers and counterclaims were sent back to the Defendants, who filed defaults on the counterclaims by then forwarding the same to a Post Office Box in N.J., used by Petitioner as a corporation address for his interstate business. The Defendant Thomas E. Sundstrom filed his answer admitting to the claim of the Petitioners, with a further cross claim against the corporate bank, and the trust officers, who refused him assistance in his need. Having been served with the answer of the Defendant Thomas E. Sundstrom, the Petitioners filed a motion for partial summary judgment against the Defendant Thomas E. Sundstrom. A ruling on that was postponed by the trial judge. On the return date of the summary judgment motion, the Petitioner addressed the Court that deposition had just begun, and that notice had been given to attend a pre-trial hearing on January of 198', to which the Court replied to Petitioner that "if you have trouble with that, let me know!" Deposition on oral examination began, and was adjourned until after Christmas, and also that the court reporter was far behind on his assignments. In mid January, 1981, Petitioner moved the court for an extension of time to complete discovery, to which the court responded to a Report and Recommendation of the United States Magistrate arising from a mistaken postponement of a pre-trial hearing, to which counsel for the corporate trustee and the trust officers attended, and Petitioners and Defendant John J. Markwardt, Esq., did not. The Report and Recommendation of the United States Magistrate was served to Petitioners, who had recently moved from Maryland to New Jersey, and the Petitioners responded by filing timely Objections, only to find that the trial judge had entered a dismissal upon the Report and Recom-

mendation of the Magistrate two days before the Petitioners had filed their Objections with affidavits and exhibits. The lone affidavit of counsel for the Defendants was attached to the Report and Recommendation.

An appeal was taken timely to the United States Court of Appeals, and was sent back with instructions that the appeal was defective under rule provided for multiple claims and multiple parties: the counterclaims not having been resolved. This was on June 10, 1982, and was numbered No. 81-1868. After another conference with the United States Magistrate, the Defendants agreed to dismiss their counterclaims. The Defendant John J. Markwardt, Esq. submitted a form order to which petitioners objected, as it did not include the cross claim of the Defendant Thomas E. Sundstrom, which alleged independent jurisdiction under the civil rights titles *(42 USC 1983; 42 USC 1985)*. The trial judge on July 13, 1983, on a Tuesday, in chambers, entered an order denying Petitioners motion to reinstate the Original Complaint. On July 14, 1983, with no notice of motion to any litigant, the trial judge, in chambers, entered an order dismissing the counterclaims without prejudice of the Defendants for malicious prosecution, and further dismissed the cross claim of the defendant Thomas E. Sundstrom, with prejudice, and without costs. Petitioners received no notice of motion, nor any orders entered on July 13, 1983, and July 14, 1983, although the docket entries manifest that notice had been mailed on July 13, 1983 of the Order denying the motion for reinstatement of the original complaint.

Approximately mid September, 1983, Petitioners contacted the Clerk of Court in Camden, N.J. who informed the same that the file was in Trenton, and was in the dead files there: whereupon, a call to the Clerk in Trenton, N.J. led to copies being mailed to Petitioners, who set down the earliest motion date to move the Court to correct the defect in mailing of the orders of July 13, 1983, and July 14, 1983. A call was made to the postmistress of Faulkner, Maryland, who revealed that she had seen a piece of mail like it came from a court, but sent it back as the box was closed some two years before, and 18 months had lapsed in which mail could be forwarded.

Petitioners were denied their motion under *Rule 60 FRCP* to correct the defects in service of process, and to set the time to appeal running as of course. The Appeal to the United States Court of Appeals ensued, at which time, on motion of the Defendants, the ap-

peal was limited to the narrow issues of the order of November 21, 1983, and the Court declined to rule on the merits of the case. On another latitude, the Defendant Thomas E. Sundstrom, having been served with appeal papers by the Petitioners, filed an appeal forma pauperis, and was subsequently dismissed for jurisdictional defects, as the appeal was also untimely filed; that Defendant never having been served with the controlling Order of July 14, 1984, and never having been served with a notice of motion under *Rule 56 FRCP* regarding his cross claim. The Petitioners appeal was also dismissed in that the relief sought under *Rule 60 FRCP* was precluded by the express provision of *FRCP 77(d)*.

The Petitioners seek a review of the procedures of the trial judge, the Clerk of the District Court, and the United States Magistrate, and have the merits of the case sent back to trial by jury, which was demanded in the Plaintiffs' Original Complaint.

BASIS FOR FEDERAL JURISDICTION

FEDERAL JURISDICTION in the court of first instance was invoked under *28 U.S.C. 1332*, the Plaintiffs being citizens of the State of Maryland, and the Defendants being citizens of the State of New Jersey and/or Pennsylvania, and in the case of Thomas E. Sundstrom, a citizen of a State other than Maryland. The amount in controversy exceeded the sum of ten thousand dollars ($10,000.) exclusive of interest and costs.

FEDERAL JURISDICTION in the court of first instance was invoked by Defendant/Cross Claimant Thomas E. Sundstrom under *28 U.S.C. 1332*, under *28 U.S.C. 1343*, *42 U.S.C. 1983*, and *42 U.S.C. 1985*, as set forth in Defendant/Crossclaimant's jurisdictional paragraph.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

ARGUMENT

As to Question One (1)

Did the Actions of the United States Magistrate, and the District Judge, deny Petitioners right of trial by jury as demanded in Plaintiffs' Original Complaint, by dismissing their complaint under *28 USC 636?*

When public officials are charged with the responsibility of protecting the rights of due process, and equal protection of the law, so act in such a capricious, arbitrary, and outright prejudicial manner, they not only derrogate from those rights, but they deny to those individuals their civil rights guaranteed by the Federal Constitution: the right to notice, and the right to have their opportunity to be heard in a court, by a jury of their peers as the trier of the facts. Virtually all citizens, be they public officials, or not, are held answerable and liable for their tortious acts, which constitutes a denial and a deprivation of anothers civil rights. One of the few exceptions, however, has been the immunity granted to our judges, by our judges, and to those whose duties fall within, and under the cover of judicial responsibility. This immunity, well founded on reason and logic, keeps the Courts free to decide, without fear of legal redress, and applies only to the person of the judicial official, so long as the act applied to the immunity, falls within the jurisdiction of the court. The immunity does not apply to the judgment reached by those officials, if the judgment occurs by corrupt and erroneous methods and means used by those immune officials. Those judgments, and the acts preceeding those judgments are not immune, and have always been subject to review and correction of the error and prejudice created by tortious acts of immune officials. It is those errors, and those prejudices to which this Petition of a Writ of Certiorari should be directed, and the specific reasons for the granting of the same.

The subject of their personal immunity is a well settled doctrine. *Bradley v. Fisher, 13 Wall (80 U.S.) 335, 20 L.Ed. 646 (1871); Pierson v. Ray, 87 S. Ct. 1217, 18 L. Ed.2nd (1967); Sullivan v. Kelleher, 405 F. 2nd 486 (1968); Sullivan v. Choquette, 420 F.2nd 674 (1st Cir. 1969) cert denied, Rehearing Den.* The subject of judicial immunity is not the issue here, only the acts committed by those judicially immune public officials, so that the immunity afforded to the person

does not reflect as the immunity which cannot be granted to the effects of those acts committed.

For the purposes of clarity in outline, those errors and prejudices are presented in chronological order to wit:

A. The U.S. Magistrate denied Petitioners an opportunity to be heard as to why they were absent from a pre-trial hearing, and permitted Defendants to file an affidavit, not served for objection or rebuttal, to support the Report and Recommendation for Dismissal as a sanction for missing the pretrial hearing. (9a). The U.S. Magistrate excluded the Defendant John J. Markwardt, Esq., from any form of punishment for being absent from any pretrial hearing, and excluded that fact from his Report and Recommendation. (5a). The punishment meted out and recommended by the United States Magistrate was cruel and unusual punishment, in that the litigation involved a loss of not less than fifty five thousand dollars ($55,000.) in loss of property, and a loss of a primary home. The inequitable treatment was unfair, and unjust, and violated the equal protection clause of the United States Constitution. (69a).

B. Upon filing the Report and Recommendation on March 5, 1981, the U.S. Magistrate sent the Report and Recommendation to the District Judge, who entered an Order of Dismissal, without 10 days notice required by *28 U.S.C. 636*, and *Rule 56 FRCP*, and entered that Order of Dismissal on March 16, 1981. Service of the Report and Recommendation of the Magistrate was not receipted until March 9, 1981 by the Petitioners, by certified mail, and addressed to three addressses (141a) to wit: P.O. Box 634, Ocean City, N.J. 08226, Route 301, Box 205, Newburg, Md. 20664, and P.O. Box 98, Maryland 20632. The same was receipted at all three addresses. The Petitioners filed their 90 page Affidavits and Documentation, with exhibits on March 18, 1981, one full day in time. The order of dismissal (25a) was premature by two full days, and the District Court did not make a de novo determination as required by *28 U.S.C. 636*. The order of dismissal and the Objections to the Report and Recommendation crossed in the mail.

Case law and Statute to support the Petition for the Writ.

Orand v. U.S., (C.A. Or. 1979) 602 F.2nd 207
Aluminium Co. of America, Badin Works, Badin, N.C. v. U.S. Environmental Protection Agency, (C.A.N.C. 1981) 663 F2nd 499
U.S. v. Lee Wood Contracting, Inc., D.C. Michigan 1981, 552 F.Supp. 748
Sims v. Wyrick, D.C. Mo. 1982 552 F. Supp. 748
Williford v. Secretary of Health and Human Services, D.C. Ohio 550 F. Supp. 248
Hutchinson v. Schweiker, D.C. Ohio 1982, 535 F. Supp. 962
U.S. for the Use and Benefit of Naberhaus-Burke, Inc. v. Butt and Head, Inc., D.C. Ohio 1982, 535 F. Supp. 1153.

C. The Statute *28 U.S.C. 646* does not give enabling power to the Magistrate to Recommend dismissal of the Plaintiffs Original Complaint for failure to appear for a pretrial hearing, but limits his punitive power to *28 U.S.C. 646(e)*, to constitute a contempt, with a hearing in a summary judgment manner before the District Judge. The entire dismissal proceedings was carried out in an ex parte manner, with no hearing, or opportunity to be heard, and excused the Defendant John J. Markwardt, Esq., for the same offense with impunity.

The Statute *28 U.S.C. 636* is set forth in the appendix at (71a).

Conclusion

The Plaintiffs' Original Complaint demanded trial by jury on all counts of the complaint, and the Petitioners were deprived of a jury trial in violation of the *Federal Constitution*, and *Rule 38 FRCP*. The matter should be remanded back to the District Court, with instructions to extend discovery proceedings, and proceed into a jury trial as demanded by the Petitioners in the Plaintiffs' Original Complaint, with leave to amend the Complaint with newly developed factual information running from the time of dismissal.

As to Question Two (2)

With the same energy and time that was expended by the District Court Judge to keep these issues and merits from a jury, this matter could have been resolved by that jury in less than three days. The dismissal of the Plaintiffs' Original Complaint has consumed time from the date of May 29, 1980 until the present day. It has been to the Court of Appeals on two occasions; the first appeal rejected due to procedural defects (37a) and second appeal for the untimely filing of the notice of appeal, and a refusal of the Court of Appeals to correct defects in service of an order entered by the District Judge, in chambers, on July 14, 1983, which controlled the running of the time to file that notice of appeal.

Petitioners state as the reason for granting a Writ of Certioriari, is that Federal Statutes, and Court Rules have been repeatedly violated to accomplish this dismissal, and the refusal to reinstate the Plaintiffs' Original Complaint for trial by jury. The reasons and motives of the Court are apparent on a bilateral basis; (1) the Petitioners are pro se, and (2) two of the defendants are attorneys at law, who are charged with tortious conduct and activity in the disobedience of a State Probate Court Order, which caused a mortgage commitment to be cancelled, thus causing the Petitioners to lose a trust premises to be sold to them, as part of a settlement in an Estate (150a). Their activities were demanded to be tried before a jury, not before a Magistrate, whose report and recommendation was supported by a lone affidavit, ipsi dixit. This circumstance already prejudices the Petitioners as the visiting team. The Petitioners never consented to an appearance before a U.S. Magistrate (5a); they demanded a jury. Leading case law on the State forum on the subject matter was cited in *Ganger v. Moffett, 8 N.J. 73, 79*, where the State Supreme Court ruled that a vendor ....."unwarrantably refuses to execute the deed the vendee is entitled to recover the amount of money which he has paid on the account of the purchase, and the loss of his bargain, that is, the difference between the market price[1] of the property and the

[1] The purchase price was $25,000, to compensate for $16,900, agreed by the brother beneficiaries to replace the agreement in 1967, when Mary V. Sullivan died testate, and it was agreed that the premises be placed in the individual trust of James Sundstrom Sullivan. The premises appreciated in value by 1979 to over $100,000, due to Casino gambling 8 miles away. The corporate trustee never transferred the property to that trust.

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purchase price, provided by contract, if the jury should find that the market price was in excess of the purchase price. ★★★★★★★★★ citing cases".

These petitioners were kept from that jury in the following manner, manifesting a steady stream of violations of Statutes and Court Rules.

A. A denial of trial by jury under color of *28 U.S.C. 636*, with depositions halted by denial of extension of time, due to reporter being behind schedule. (71a). Denial of motion to set aside default on answer to counterclaims defectively served, by inserting stale Post Office adress in Maryland with physical address, not set forth in summons or complaint.

Case Law and Statutes to support the Petition for the Writ.

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 1952
Roller v. Holly, 176 US 398, 20 S. Ct. 410, 44 L. Ed. 520
Rule 5(b) Service of Pleadings and Orders (78a)
Rule 9 of Local Rules of N.J. Federal Courts. Service of Papers (52a).

B. Failure of Trial Judge to Include Disposition of Counterclaims in his Order of Dismissal of March 16, 1981 (25a) causing first Appeal #81-1868 to the United States Court of Appeals, to be remanded back to District Court as an unappealable order (26a), on June 10, 1982. Order of Dismissal drafted by District Judge witout any time to Petitioners to object to form or content required by *Local Rule 22* (56a), causing first appeal to be sent back as unappealable. Matter should have been decided on merits:

Case law and Statutes to support the Petition for the Writ.

Rule 54 FRCP Judgments and Costs (82a)
Local Rule 22 N.J. Federal Rules Entry of Judgment and Orders. Five days Notice for Objection as to form and context.

C. Upon advice of U.S. Magistrate at second pretrial hearing, Petitioners filed motion for reinstatement of Original Complaint, and was denied by trial judge. Prevailing parties did not submit order under Local Federal Rule, and order sub-

mitted by Plaintiffs inadequate, and trial judge prepared order without service to Plaintiffs for context and form in violation of said Local Rule. No notice ever received by Petitioners on disposition of said motion, although docket entries manifest notice sent. Plaintiffs included a return envelope for their order submitted, stamped and addressed to P.O. Box 634, Ocean City, N.J. 08226. No service of the order of June 13, 1983 ever received by Plaintiffs. Order defectively mailed to P.O. Box 98, Faulkner, Maryland 20632 by Clerk, and sent back to Clerk by Faulkner, Maryland Postmistress citing Box closed. United States Magistrate, in pretrial hearing for special problems on 10/21/82, was fully aware of Petitioners completely moved to New Jersey, and P.O. Box 634, Ocean City, N.J. was mailing address of record.

Case law and Statutes to support the Petition for the Writ

Local Federal Rule 12, Motions and Arguments (52a)
Rule 5(b) FRCP, Service at Last known address (78a).

Conclusion

The District Judge denied both Petitioners and Defendant Thomas E. Sundstrom trial by jury, as demanded on issues of fact, by dismissing the original complaint and the cross claim unlawfully, in direct violation of *28 U.S.C. 636, Rule 5 FRCP, Rule 56 FRCP, Local Rule 12 and Local Rule 22* of the New Jersey District Courts. The District Judge furthered the abuse by not setting down the cross claim of Defendant Thomas E. Sundstrom, for a summary judgment motion, giving ten days notice to all parties, for an interpretation of the last will and testament of Mary V. Sullivan, under the civil rights titles, and under *28 U.S.C. 1332*.

As To Question Three (3)

Did United States Court of Appeals err in limiting present appeal to confined issue of defective service of final order of July 14, 1983.

Petitioners are beset with more violations of due process and equal protection of the law than is normal for one piece of litigation. There have been two appeals, one dismissed for prematurity under *Rule 54 FRCP*; and the second appeal based on the Clerk's immunity for service of orders under *Rule 77 FRCP*. The Plaintiffs' Original Complaint was dismissed under *28 USC 636*, two full days before a de novo determination could possibly have been made by the trial judge. The dismissal excluded depositions which were being prepared by the court reporter, and not actually filed under the docket entries under June 30, 1981, almost three and one half months later. The docket entries also show that (142a) entries into the docket give the appearance that the objections to the Report and Recommendation are on line 19, filed 3/18/81, and the Order of Dismissal filed on 3/16/84, on line 20. The appearance of the numerical entry on the docket was to give the chronological appearance that the Objections were considered and denied. The situation manifests clear fraud by the Court, and more reasons to grant the Writ.

One of the considerations the Court of Appeals bypassed was that this appeal the second time, essentially was the same appeal as the first time; the arguments were the same, and issues and the applicable law was the same. The only difference was time, and disposing of a counterclaim which had no merit at all, for the counterclaim alleged malicious prosecution by the two attorney defendants. They set forth no jurisdictional paragraph, failed to allege in which prior proceeding they had terminated favorably, and generally could not allege where Petitioners did not have probable cause for a contract and tort action in the United States District Court. There was no reason why the first appeal could not have been decided on the merits. In lieu of this, the appeal was sent back for final orders disposing of multiple claim with multiple parties. Orders were submitted, and Petitioners objected as to form and content. (32a). Notice of motion was filed by Petitioners to reinstate the Original Complaint, citing to the court the violation of *28 USC 646*, in that Plaintiffs' Objections of 80 pages filed April 18, 1983, did not receive a de novo determination by the District Judge, and that the Order of Dismissal was

docketed two days prior, on April 16, 1983. That motion was denied, and the prevailing party did not submit an order. Plaintiffs' anticipated order was inadequate and denied so that under *Local Rule 12 of the N.J. Federal Courts* the burden to submit that order was on the Defendants. In lieu of this, on July 13, 1983, the District Judge formed the order, and the docket entries manifest that notice had been mailed. (142a). Although the Court Clerk had a stamped addressed envelope for convenience addressed to P.O. Box 634, Ocean City, N.J. 08226, the Court chose to mail the same to P.O. Box 98, Faulkner, Md. 20632. The entry of P.O. Box 634, Ocean City, N.J. 08226 on the docket entries manifests that the address has been typewritten out, although mail had repeatedly crossed from the Court to the Petitioners at P.O. Box 634, Ocean City, N.J. 08226. This mailing of the order of July 13, 1983 to Maryland was more than just error and prejudice; it was outright and extrinsic fraud. To support this, with United States mail being forwarded, the Clerk did not take the kindness or trouble to forward this notice on. The same is true for the following Order of July 14, 1983, which controlled the tolling of the time for appeal. That order, according to the Postmistress of Faulkner, Maryland, was sent back to the Clerk of Court. His reasons were obvious, he was trying to thwart the appeal he knew was forthcoming, and on the legal merits, the Petitioners had to prevail.

The real merits of this matter have long been bypassed into legal and manipulative maneuvering. Petitioners had a Probate Court Order to purchase trust premises, which was to have been in the individual trust for James Sundstrom Sullivan. In a settlement in Probate, Sullivan obtained a mortgage, and had financing, and the Respondents refused to convey on three separate occasions, and three submissions of mortgage papers. On the fourth attempt, the Defendant Thomas E. Sundstrom, being brutally treated by the corporate trustees, and their lawyer and officers, refused to convey, and the mortgage application was cancelled. These were jury issues. The United States Court of Appeals has dodged the bullet on the first appeal through needless application of *Rule 54 FRCP*. They avoided the second appeal by rules that Petitioners cannot cure the fraud and deception practiced under *Rule 60 FRCP*. The position of the Petitioners is that the instant matter should never have been before a U.S. Magistrate; that his Report and Recommendation, supported by a lone affidavit was harsh and unjustified; the Order of Dismissal was in error, and

in violation of Federal Statute, and that throughout, the errors and prejudices in notice and opportunity to be heard was overwhelming.

> IT IS TOO LATE IN THE DAY AND ENTIRELY TOO CONTRARY TO THE SPIRIT OF THE FEDERAL RULES OF PROCEDURE FOR DECISIONS ON THE MERITS TO BE AVOIDED ON SUCH MERE TECHNICALITIES. *Forman v. Davis, (1962) 371 U.S. 178, 83 S.Ct. 2279 L. Ed. 2nd 22.*

The Court of Appeals for the Third Circuit has refused to hear the first appeal, No. 81-1868, on the basis of a mere technicality; it has rationalized on the second appeal that the reason for dismissal is that the Clerk, under *Rule 77(d)* is immune from defects in mailing. It did not take into consideration the argument of the Petitioners that no notice of motion was brought for dismissal for Defendant Thomas E. Sundstrom, requiring definite notice, with notice to all parties. While the Clerk may be well immune under *Rule 77(d)*, the District Judge cannot be held free from error and prejudice from notice required under *Rule 56 FRCP* before he entered the order of July 14, 1983, controlling the appeal.

In *Smith v. Jackson Tool and Die, Inc., 5th Cir. 1970 426 F.2nd 5*, the Court upheld vacating and reentry of the judgment under *Rule 60(b)* where the clerk failed to notify the parties. In that case, as in the instant one, the error went further. The trial court in *Smith, supra*, rendered its written Opinion which was sent to counsel for the parties. Counsel for Plaintiff and Defendant expressed their willingness to delay entry, but received no reply to request. The Clerk entered the order, and the clerk failed to give notice. Correspondence from counsel to the judge disclosed that counsel believed that the Court had not yet acted. The trial court made no effort to correct the misapprehension, and the United States Court of Appeals upheld the vacating of the order, and reentry of judgment under *Rule 60(b)*. In the present appeal, the Court of Appeals ruled in reverse. The first appeal of the Sulivans was sent back as untimely in violation of *Rule 54 FRCP*. The second appeal depended upon the entry of an order adjudicating multiple claims with multiple parties. The summary judgment moved by the Sullivans was rendered moot on the Order of

July 13, 1983. The second order required the granting of the motion to voluntarily dismiss the counterclaims, and most importantly, necessitated a motion to dismiss the cross claim of Thomas E. Sundstrom; or a motion to dismiss on the pleadings; his jurisdiction soundly anchored into *42 USC 1983, and 42 USC 1985*, with no objection voiced as to the jurisdictional paragraph. Such motions clearly necessitated a conversion into *Rule 54*, with depositions, requests for admissions, written interrogatories and affidavits. This insertion of the dismissal of Defendant Thomas E. Sundstrom's cross claim to be fused with the order brought on by notice and motion is a direct violation of *Rule 54, FRCP*, requiring ten days notice, to all parties.

This order was entered surreptitiously, quietly, and almost with stealth, and sent down to Maryland, where they knew the service would be defective. The proof that they did not want to perfect service, is the fact that when they received the notices back, they refused and neglected to forward them to the address where they knew it would be perfected, the same address as they permitted the Plaintiffs to be defaulted in their answer to the alleged counterclaims, which the order of July 14, 1983 dismissed.

Conclusion

The Court of Appeals for the Third Circuit erred by not ruling on the merits of the appeal, and limiting it to the defective service of the Clerk sending the final order of July 14, 1983 to a stale address in Maryland, two years after the P.O. Box had closed and two years after Petitioners had moved from Maryland to New Jersey. The Writ should issue and after proper review of all of the merits, should be remanded back to the District Court, with a change of venue, and for trial by jury on the issues of fact, as was clearly demanded in the Plaintiffs' Original Complaint.

As To Question Four (4)

Trial judge entered order (30a) of July 14, 1983, proportedly to represent final adjudication of multiple claims and parties, without bringing notice of motion under *Rule 56*, giving ten days notice to all parties, dismissed cross claim of Defendant Thomas E. Sundstrom. Trial judge erroneously entered said order without notice of motion required by *Rule 56, FRCP*, arising from *Rule 12 FRCP*, (78a). While prejudicial to Defendant Thomas E. Sundstrom, notice of motion under *Rule 56 FRCP* was also forthcoming to the Plaintiffs. July 14, 1983 fell on a Thursday, and not a regular motion day, as set forth in *Local Federal Rule 12*, which sets down the first Friday, and third Friday in the Camden venue. The trial judge ad libbed the contents and form of the order, and failed to send both the notice of motion, and the order of July 14, 1984. If, under *Rule 77(d)*, the Clerk is not responsible for service of the same, the Court, the Clerk, and opposing parties cannot dismiss a cross claim without notice of motion. Cross claim rested upon independent jurisdiction of *28 U.S.C. 1332*. It was also founded on *42 U.S.C. 1983, and 42 USC 1985*. Defendant Thomas E. Sundstrom was removed by ex parte order, with no notice, or any opportunity to be heard to refuse to sign deed of conveyance, using color of state authority, and in direct violation of *NJS 3A:11-4* (Removal as Trustee for Cause), (50a). The ex parte order of the Superior Court of N.J., Probate Part, was obtained ex parte, by telephone, and entered May 28, 1979, striking out James Sundstrom Sullivan, and Trustee Thomas E. Sundstrom as trustees to convey the deed. The cross claim of Defendant Thomas E. Sundstrom rested on that claim; it was bypassed by the trial judge, when in the Order of July 13, 1983, he ruled that the cross claim was moot, based on the Original Complaint of the Plaintiffs being dismissed.

Case Law, Statutes, and Court Rules to support the Petition for the Writ.

Rule 13 FRCP Counterclaim and cross claim
Rule 12 FRCP (78a) Defenses, Motion to Dismiss, and on Pleadings
Rule 56 FRCP (83a) Summary Judgment
Rule 12, N.J. (52a) District Courts Motions and Arguments

Maggett v. Dalsheim, et als 709 F.2nd 800
In Re White Farm Equipt. Co., Ohio 1982, 23 B.R. 85
International Ass'n of Machinists v. United Technologies Corp., C.A.

Fla. 1983 704 F.2nd 569
Townsend v. Columbia Operations, C.A. Cal 1982, 667 F.2nd 844
Sick v. Texas Parks and Wildlife Dept., C.A. Texas 1981 644 F.2nd 1056
Continental Illinois Nat. Bank and Trust Co. of Chicago v. Burns, D.C. Ill 1982, 552 F. Supp. 113
Jones v. Illinois Rehabilitation Services, C.A. Ill 1982 689 F.2nd 724 cert denied 103 S. Ct. 177
Travelers Ins. Co. v. 1st Nat. Bank of Shreveport, C.A. La 1982 675 F.2nd 633

Conclusion

The dismissal of the Plaintiffs' Original Complaint was in violation of *28 U.S.C. 636;* the dismissal of the Defendant Thomas E. Sundstrom's Cross Claim was a direct violation of *Rule 12 FRCP, and Rule 56 FRCP*, in that no notice of motion to parties was given by the District Judge, who entered the order of July 14, 1983 on a non-motion day, without a hearing or opposing papers. The docket entries are barren of such notice of motion, or hearing date, and a Writ of Certiorari should issue to review the conduct of the trial judge, and the clerk to correct error and prejudice.

Questions Five (5) and Six (6)

Did opposing counsel violate rules of service set forth in Local Rules of Federal Courts of New Jersey? Did defective service of final order adjudicating all claims as to multiple parties deprive Petitioners right to appeal on merits. and a deprivation of due process and equal protection of the law?

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated. under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer, 311 U.S. 457, 61 S. Ct. 339, 85 L.Ed 278, 132 A.L.R. 1357; Grannis v. Ordean, 234 U.S. 385, 34 S. Ct. 779, 58 L.Ed. 1363; Priest v. Board of Trustees of the Town of Las Vegas, 232 U.S. 604, 34 S. Ct. 443, 58 L. Ed. 751; Roller v. Holly 176 U.S. 398 20 S. Ct. 410, 44 L. Ed. 520.* The notice must be of such a nature as reasonably to convey the required information. *Grannis v. Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance. *Roller v. Holly, supra,* ★★★★★★★★★ cutubg cases. But when notice is a persons due, process which is a mere gesture is not due. process. The means employed mycg be such as one desirous of actually informing the absentee might reasonable adopt to accomplish it.
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> *Mullane v. Central Hanover Bank and Trust Company, 70 S. Ct. 652, 339 U.S. 314, 315.*

Petitioners submit as a strong reason for a Writ of Review to issue is because of the repeated violations of general federal rules. and

local federal rules, the sum total of which is a flagrant violation of due process and fairness in proceedings, and equal protection of those rules designed to safeguard all litigants. The Order of July 14, 1983 was on motion of the defendants to dismiss a counterclaim. Plaintiffs objected to form and content (38a), based on the omission of the disposition of the cross claim of Defendant Thomas E. Sundstrom. The defendants prevailed, and under *Local Rule 12* of the N.J. Federal Court, the

> ..... prevailing party, upon direction of the court, shall submit an order within five days of the ruling on the motion on notice to his or her adversary. Unless otherwise directed by the court, if no objection to that order is received within seven days of receipt by the adversary, the order will automatically be signed by the court. *General Rule 12(c)* (of the District Courts of United States for the District of New Jersey.)

There was no notice of any order, as entered by the district judge on July 14, 1984. It was entered on a non-motion day, a Thursday, and with no notice of motion to dismiss, or for judgment on the pleadings, thereby sending it to summay judgment on *Rule 56 FRCP*. The Local *Rule 12*, was again violated in that the rule states:

> If a motion is noticed for any day other than a regular agreement day, unless such day has been fixed by the court, the clerk shall list the hearing for the next regular argument day and notify all counsel of the change in date. *General Rule 12(c)* (of the District Courts of the United States for the District of New Jersey.)

The trial judge chose to have the motion hearing to dismiss the cross claim of Defendant Thomas E. Sundstrom without any opposition so that no one was invited to that hearing date, nor was anyone allowed to offer any objections. The order of July 14, 1983 was entered, ex parte, and notice allegedly sent to P.O. Box 98, Faulkner, Maryland 20632, where it was returned box closed. Post Office Rules and Regulations offer only one year to forward mail. Mail had repeated-

ly been sent back and forth from the Court to the Sullivans at P.O. Box 634, Ocean City, N.J. 08226. The U.S. Magistrate corresponded with the Sullivans at the above address. The defendants knew it, as they were engaged in consolidated actions of law in the State Court from 1978 to the present day. The defendant attorneys in this matter defaulted the Sullivans in their counterclaim, when mail was sent back defectively from a stale post office address, when defendants took it upon themselves to add that post office box to a correct physical address, and thereby send the Sullivan's mail in disruption.

The truth of this situation is that they didn't want the controlling order of July 14, 1983 properly served. Taking this into consideration, and then applying the rationale of the *Mullane* decision, supra, the due process to be accorded to the Petitioners was denied in that:

1. The notices, if any, of the motion to dismiss the Counterclaims of Thomas E. Sundstrom, were not reasonably calculated to apprise Petitioners of the pendency of the action.

2. The notices, if any, under all of the circumstances, did not meet the formula of *Mullane, supra*, in that Thomas E. Sundstrom lives in Alaska, and mail one way takes seven to nine days, not nearly enough time to file objections, which would take another seven to nine days, let alone the cost and time of travel.

3. The court, the Clerk of Court, and the United States Magistrate, as well as defense counsel all had the corrected and proper address of the Petitioners. They chose to use the means of service most likely to be defective, and not of means actually desirous of informing the absentee to accomplish such service. The alleged notices of July 13, and July 14, 1983 were returned to the Clerk. Why did he not forward them to P.O. Box 634, Ocean City, N.J. 08226. Mail is free to government agencies!

A demand for trial by jury cannot be tossed away ever so unjustly by placing its complicated factual issues before a U.S. Magistrate, under the guise and color of *28 U.S.C. 636*. The Petitioners were not even given the consideration of a de novo determination, when the record attests to over eighty pages of affidavits and documents, with exhibits. With so many factual issues at stake, even summary judgment had to be denied.

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This matter was concluded by a diabolical judicial scheme of manipulation to circumvent the statutes, and the Rules of Court, not to mention a deprivation of civil and constitutional rights accorded by the Federal Constitution.

Petitioners sought a clean forum upon which to present their action in contract and common law tort against these defendants, including Thomas E. Sundstrom. The blatant and patent errors in procedure and judgment by the District Court, and the refusal of the Court of Appeals for the Third Circuit to hear the issues of law on the merit, and the merits of the case warrants review by this Court.

When research on the first appeal, *NO. 81-1868*, in 1982 there was only one case reported whereby the District Judge was reported to have been reversed. In less than two years, research manifests in excess of twenty five cases, some of which have been set out. It is apparent that District Judges are using this *28 USC 636* to avoid trials, and force matters into settlement. The instant action arose from a breached settlement with great dishonor by these defendants. Those issues are still before the State Court system. It is incumbent upon the Supreme Court of the United States to look back to the grass roots of its judicial system and see just how *28 USC 636* is being tortiously employed by judges who neither understand the issues, or attempt to avoid them by manipulative means. The end result is third class justice, or no justice at all, one being as bad as the other.

Conclusion

The Writ of Certiorari should issue, not only to place these Petitioners to their status quo demand for trial by jury, but to set down a firm guide that *28 USC 636* is not a substitute for a jury, but to expedite the moving along of cases to be settled as was its design. The review should include that this trial by Jury be held in the furtherest point from the Camden, New Jersey venue to offset the prejudice and influence of local attorneys familiar to the Court, and the always present influence of the 1st Peoples Bank of N.J., and its trust officers.

Respectfully submitted,

by s/J.S.S.
James Sundstrom Sullivan

by s/H.D.S.
Helen Dawson Sullivan